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No. 81-2392

In The

SUPREME COURT OF THE UNITED STATES

October Term, 1981

Phillips Petroleum Company,

Petitioner,

v.

Eddie C. Saucedo,

Respondent.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

Brief of Respondent

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STATEMENT OF THE CASE

Petitioner's statement of the case is fundamentally inaccurate because it omits reference to two facts found by the trial court, upon which Petitioner's liability was based.

The first omitted fact is that Petitioner's employed engineers were responsible for designing the system which prevents external corrosion, and for designing tests to determine the efficacy of that system on the pipeline in question. (S.F. 122-123; 743). The owner of the pipeline paid Petitioner $3.9 million for this and similar services during 1974, the year of Saucedo's injury. It was Petitioner's sub-standard engineering and testing procedures (S.F. 482-83; 466-67) which failed and allowed the external corrosion leak in the pipeline which Saucedo was repairing at the time of his injury (S. F.

194-202; 698-99). Defendant's engineer Fred Mayes testified that such leaks could be entirely eliminated (S.F. 137-37) but that ultimately "you get to the point where it costs you perhaps more money to prevent a leak than the leak would cost itself" (S.F. 141).

Thus, a ground of the trial court's judgment was that Petitioner had negligently discharged its duty to provide competent engineering services to the pipeline, exposing Saucedo and others to the hazard of exposure to explosive and flammable gas.

The second fact omitted from Petitioner's Statement concerns Petitioner's detailed knowledge of the capability of the pipeline. This knowledge was both imputed and actual.

Petitioner is charged with knowledge of the contents of a report by the National

Transportation Safety Board (Plaintiff's Ex. No. 1) of its investigation into an earlier mishap on the pipeline in which six people were killed and two more were injured. That report thoroughly discussed the history of the pipeline, and the NTSB then concluded that the pipeline was "not structurally adequate" for the purpose of transporting extrahazardous materials (Plaintiff's Ex. No. 1, p. 19).

Petitioner's actual knowledge of the pipeline's inadequacy stems from its own employee's maintenance of "Leak Records" reflecting the pipeline's annual performance (S.F. 178; Plaintiff's Ex. No. 15). Respondent's expert witness testified, on the basis of documents in evidence and referred to herein, that the pipeline was unfit for use in transporting hazardous materials (S.F. 484-85).

With this knowledge, Petitioner continued to entrust its extrahazardous material to this unfit vessel, negligently exposing Saucedo and others to the risk of injury.

These two omitted facts are the bases of the trial court's imposition of liability on Petitioner under the applicable law of the forum state.

SUMMARY OF THE ARGUMENT

Petitioner has failed to assert any reason for granting a writ of certiorari. This is a purely private dispute between an individual and an out-of-state corporation. In the trial court, Petitioner defended itself strictly upon its construction of the decisional tort law of Texas. Petitioner raised Federal and constitutional issues in its Petition for Rehearing in the Court of Appeals, and perpetuates these

issues in Point III of its Petition for Writ of Certiorari, but these issues have no intrinsic merit nor basis in the trial record. In truth, it is manifestly obvious that the Petition for Writ of Certiorari was filed solely for the purpose of delay, to enable Petitioner to continue benefitting from the disparity between legal interest on Respondent's judgment (in Texas, nine per cent) and commercial rates available to Petitioner.

ARGUMENT

I.
(In Response to Petitioner's Points I, II and IV)

The court below correctly applied the law of Texas to the evidence and fairly considered Petitioner's points of appeal.

Petitioner's liability to Saucedo is well founded upon the decisional law of Texas and upon the evidence received by the

trial court. Petitioner's conscious decision to compromise the adequacy of its corrosion engineering on economic grounds, and its decision to continue to utilize the pipeline despite its proven record of unreliability were negligent acts which proximately caused Saucedo's injuries. See Montgomery Ward & Co. v. Scharrenbeck, 204 S.W.2d 508 (Tex. 1947); Gray v. Martindale Lumber Co., 515 F.2d 1218 (5th Cir. 1975), 527 F.2d 1352 (5th Cir. 1976).

Petitioner raised the "repairman's defense" for the first time in the Court of Appeals, which justly ignored that point as having no application in this case. Neither of the two decisions on which it principally relies support Petitioner's interpretation. Scurlock Oil Co. v. Birchfield, 630 S.W.2d 674 (Tex. Civ. App.--Houston [1st] 1981, no writ hist.), has little precedential value and, in any

event, never refers to the "repairman's defense." Instead, the court held that the plaintiff's injury was not, as a matter of law, foreseeable so that defendant's negligence could not have been a proximate cause of his damages. The Fifth Circuit summarized the evidence presented here and held that Saucedo's injury was foreseeable by Petitioner.

Petitioner's other basis for asserting the "repairman's defense" is City of Beaumont v. Graham, 441 S.W.2d 829 (Tex. 1969). In that opinion, the Texas Supreme Court characterized the argument as "but an extension ... of the doctrine of assumed risk," 441 S.W.2d at 834; the doctrine of assumed risk, as a complete defense, was abolished in Texas by Farley v. M M Cattle Co., 529 S.W.2d 751 (Tex. 1975).

Finally, Petitioner's reliance upon the "repairman's defense" is misplaced because

it is not the owner of the pipeline but rather the party whose negligent engineering allowed it to become defective. The annotation cited by Petitioner makes it clear that the defense, in jurisdictions in which it is recognized, is available to owner-occupiers only and Petitioner clearly does not occupy that status. 31 A.L.R. 2d 1375 (1953).

II.
(In Response to Petitioner's Point III)

The decision below affects no constitutional right of Petitioner.

The premise of Petitioner's argument under Point III is apparently that the Petitioner is merely the passive and innocent victim of the negligence of its subsidiary, the Phillips Pipe Line Company, in the latter's operation of the pipeline in question. Of course, the record does

not support this view. Petitioner is liable to Saucedo because of its own negligence which proximately caused his injuries; the trial court specifically ruled in its Conclusions of Law that Petitioner is not vicariously liable for the pipeline company's negligence.

CONCLUSION

Respondent Eddie C. Saucedo respectfully urges that the Petition for Writ of Certiorari be promptly denied.

Respectfully submitted,

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